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No. 10-873

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IDELMA ANA SAENZ, YOLANDA RAMIREZ, GLORIA SAENZ, Individually and as Next Friend of Diana Figueroa, DIANA FIGUEROA, JESUS HENRY SAENZ and JESUS SAENZ, Individually and as Administrator for the Estates of Dominga Saenz and Nelson Saenz,

Petitioners,

v.

CITY OF MCALLEN, ARMANDO HERNANDEZ, HUMBERTO RESENDEZ, ORLANDO OLIVAREZ and YASSER HASSAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's Opinion affirming the grant of summary judgment based on qualified immunity as applied to the facts of this case does not conflict with a decision of this Court and where the Petitioners failed to establish a substantive due process violation?

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's opinion affirming the District Court's conclusion the Petitioners failed to establish a municipal liability claim as to the City of McAllen does not conflict with a decision of this Court?

PARTIES

Petitioners:

Idelma Ana Saenz, Yolanda Ramirez, Gloria Saenz, Individually and as Next Friend of Diana Figueroa, Diana Figueroa, Jesus Henry Saenz, and Jesus Saenz, Individually and as Administrator of the Estates of Dominga Saenz and Nelson Saenz

Respondents:

City of McAllen, Armando Hernandez, Humberto Resendez, Orlando Olivarez, and Yasser Hassan

CORPORATE DISCLOSURE STATEMENT

Respondent City of McAllen is a municipality in the State of Texas. Respondents Armando Hernandez, Humberto Resendez, Orlando Olivarez, and Yasser Hassan were police officers employed by the City of McAllen at the time of the incident made the basis of this suit.

Petitioners are the family and Estates of the deceased, Dominga Saenz and Nelson Saenz.

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The United States Court of Appeals for the Fifth Circuit issued its Opinion on October 4, 2010, *Saenz v. City of McAllen*, No. 09-41072, 2010 WL 3852358 (5th Cir. Oct. 4, 2010) (unpublished). (Pet. App. at 1-15). The Honorable Dorina Ramos, United States Magistrate Judge, Southern District of Texas, McAllen Division, issued a Memorandum of Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss on September 28, 2007, *Saenz v. City of McAllen*, No. 06-00352 (S.D. Tex. Sept. 28, 2007). (Pet. App. at 16-48). The Honorable Dorina Ramos, United States Magistrate Judge, Southern District of Texas, McAllen Division, issued a Memorandum of Decision and Order Granting Defendants' Motion for Summary Judgment and Final Judgment on September 21, 2009, *Saenz v. City of McAllen*, No. 06-00352 (S.D. Tex. Sept. 21, 2009). (Pet. App. at 49-72).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 4, 2010. (Pet. App. at 1-15). There were no motions for rehearing filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Rule 10 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Compelling reasons are indicated if the decision leading to the petition contributes to a conflict of authority

between the courts of appeals or state courts of last resort; reflects a departure from the usual course of proceedings; or presents an important question of federal law that has not been, but should be, settled by this Court.

Petitioners have not set forth an adequate basis that would amount to compelling reasons which would justify the exercise of this Court's discretionary jurisdiction. The legal principles of the present case were set forth by this Court in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) and *Pearson v. Callahan*, 555 U.S. 223 (2009). Accordingly, there is no conflict of authority which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioners are family members of Decedents Dominga Saenz and Nelson Saenz. Decedent Dominga Saenz was the mother of Decedent Nelson Saenz, and Petitioners Idelma Ana Saenz, Yolanda Ramirez, Diana Figueroa, Gloria Saenz, Jesus Henry Saenz, and the wife of Petitioner Jesus Saenz. The Petitioners originally filed this action in the United States District Court, Southern District of Texas, McAllen Division against Respondents City of McAllen and the individual officers, Armando Hernandez, Humberto Resendez, Orlando Olivarez, and Yasser Hassan. The Petitioners alleged a claim against the City of McAllen and the individual officers—Hernandez, Resendez, Olivarez, and Hassan—under the state-created danger exception to the Due Process Clause.

The case sub judice concerns the questions of whether or not Respondents Hernandez, Resendez, Olivarez, and Hassan are entitled to qualified immunity as to the

Petitioners' state-created danger claim, and whether or not Respondent City of McAllen can be held liable for Petitioners' claim under the state-created danger exception to the Due Process Clause.

This Court has previously set forth the legal principles involved in this case:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text ... the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing its power, or employing it as an instrument of oppression"... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The framers were content to lead the extent of governmental obligation in the latter area to the democratic political process.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195-196 (1989).

And in the context of claims of qualified immunity, this Court has enunciated the legal framework in analyzing such claims as follows:

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In *Pearson v. Callahan*, this Court relaxed the rigid order of the qualified immunity analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), which mandated a two-step sequence for resolving government officials' qualified immunity claims: (1) first, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right; (2) second, if the plaintiff has satisfied the first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Pearson*, 129 S.Ct. at 815-816, 821 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This Court's decision in *Pearson* now allows courts to have the discretion to determine the order of addressing the two-prong legal framework for resolving claims of qualified immunity based on the circumstances of each case. *Pearson*, 129 S.Ct. at 821.

Petitioners' allegations do not state a cause of action under the state-created danger exception to the Due Process Clause. Moreover, the individual officers are entitled to qualified immunity as the Petitioners' allegations do not assert a claim under the state-created danger exception and because the state-created danger

theory as a basis of liability was not clearly established at the time this incident occurred. Respondents assert that there are no compelling reasons for this Court to readdress these issues.

I. RESPONDENTS' STATEMENT OF FACTS AS SUPPORTED BY THE RECORD

Throughout this case, the Petitioners have made inconsistent statements and recitations of their version of the facts of this case. (Pet. App. at 3, n. 2). Respondents will present the facts as have been supported by the evidence set forth in the record.

The incident made the basis of this lawsuit occurred on September 3, 2005 at the residence of Decedent Nelson Saenz located at 2125 Kerria Street, Apt. 10 in McAllen, Texas. At the time of the incident in question, Respondent Armando Hernandez worked as an Investigator with the McAllen Police Department. (USCA5 236). Decedent Dominga Saenz was the aunt of Respondent Hernandez's wife, Linda Hernandez, and Decedent Nelson Saenz was a first cousin of Linda Hernandez. (USCA5 238). Respondent Hernandez was off-duty on the day of the incident. (USCA5 277). While at home on the afternoon of September 3, 2005, Linda Hernandez informed her husband (Armando Hernandez) that her Aunt Dominga Saenz had called her to talk about Dominga's son, Nelson Saenz, who was known to suffer from mental illness. (USCA5 310). According to Linda Hernandez, her Aunt Dominga had told her Nelson had been acting strange and had not been taking his medication for his mental illness. (USCA5 305). Dominga asked Linda if she could go over to Nelson's apartment and try to have him committed

to a hospital. (USCA5 306). Linda asked her husband Armando to go with her to Nelson's apartment to check on Nelson. (USCA5 241-242). While Armando and Linda were on their way to Nelson's apartment, Armando called the McAllen Police Department and requested police assistance at Nelson's apartment. (USCA5 242-243). Armando advised the dispatcher that a family member was possibly having mental problems and might need to be medically committed. (USCA5 242-243). The dispatcher asked Armando if there were any weapons at the location, so Armando asked his wife Linda and she told him that Nelson had weapons in his home. (USCA5 243-244). Armando told the dispatcher about the weapons and they advised him they would be sending an officer. (USCA5 243-244).

When Armando and his wife Linda arrived at Nelson's apartment, they attempted to make contact with Nelson at his front door, but Nelson told them he was indisposed and to come back in a week. (USCA5 246). Armando and Linda knocked on the front door again, but Nelson did not respond back. (USCA5 246-247). Shortly thereafter, McAllen Police Officers Yasser Hassan, Humberto Resendez, and Orlando Olivarez arrived at Nelson's apartment complex. (USCA5 251). Linda then called her Aunt Dominga to tell her that Nelson did not want to come out of his apartment. (USCA5 250). Linda then told Armando that her Aunt Dominga (Nelson's mother) was coming over to speak to her son Nelson. (USCA5 250). Armando then informed the police officers that Nelson was acting strange and was possibly not taking his medication, that Nelson might have weapons inside his home based on information given by his family, and that Nelson had killed his wife over 30 years ago due to his mental illness.

(USCA5 252). Armando also asked all three police officers if they had their bullet-proof vests on just in case Nelson was a danger to himself and/or others. (USCA5 255).

Shortly thereafter, Nelson's two sisters, Ana Saenz and Yolanda Ramirez, arrived at the scene with their mother Dominga Saenz. (USCA5 256-257). Armando assisted Dominga out of the car and she told him to go with her to Nelson's front door because she said Nelson would come outside for her. (USCA5 257). Dominga, Linda, and Armando then walked to the front door of Nelson's apartment. (USCA5 258). Linda, as requested by her Aunt Dominga Saenz, asked the officers to remain out of sight so Nelson would not see the police in the area. (USCA5 325). All three police officers positioned themselves against the wall of the apartment so they would not be seen by Nelson. (USCA5 385). At this point in time, none of the individual officers (Olivarez, Resendez and Hassan) had un-holstered their weapons at this time. (USCA5 385). Dominga, Linda, and Armando all stood in front of Nelson's front door to try and make contact with him. (USCA5 261). Their attempts were unsuccessful as Nelson continued to tell them to leave him alone and then began to curse at them very angrily. (USCA5 261-263).

Dominga began pleading for her son to come outside and got down on her knees and began to pray. (USCA5 263-265). Within a matter of seconds, Nelson opened his front door, and stepped outside with a handgun pointed at Armando's head. (USCA5 263-276). As Linda and Armando started to run for their safety, Nelson began to shoot at his mother Dominga Saenz. (USCA5 263-276). Dominga then fell on her back and the police officers (Resendez, Olivarez and Hassan) un-holstered

their weapons for the first time and began to return fire at Nelson in an attempt to protect the lives of Dominga, Linda, and Armando. (USCA5 263-276). Armando stated that Dominga was lying flat on her back and was not in the direct line of fire when the officers fired shots at Nelson. (USCA5 263-276). Both Dominga Saenz and Nelson Saenz died as a result of the injuries they each sustained during this incident. Nelson Saenz was struck by one gunshot fired from the pistol of Officer Humberto Resendez, which resulted in his death. (USCA5 410-411). The fatal shot causing the death of Dominga Saenz was fired from the gun used by Nelson Saenz. (USCA5 411, 456-457).

II. PETITIONERS' ATTEMPT TO ASSERT NEW CLAIMS

At the U.S. Court of Appeals for the Fifth Circuit, the Petitioners attempted to assert, for the very first time in this lawsuit, a second basis for liability under the "special relationship" theory. (Pet. App. at 12, n. 6; USCA5 1022, n. 1; USCA5 886).

Claims not raised in the district court cannot be asserted for the first time on appeal, and this Court will not consider an issue that a party fails to raise in the district court. *See United States v. Bean*, 537 U.S. 71, 75 n.2 (2002); *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 669 (5th Cir. 2004). Since the filing of this lawsuit, the Petitioners proceeded strictly on a state-created danger theory of liability. (USCA5 1022 n. 1; USCA5 886). Thus, the Petitioners cannot assert a claim under the "special relationship" theory for the first time on appeal. Accordingly, this Court should not consider the Petitioners' claim under the "special relationship" theory.

III. MOTION TO DISMISS & MOTION FOR SUMMARY JUDGMENT

Respondent City of McAllen filed its Motion to Dismiss under FED. R. CIV. P. 12(b)(6) seeking dismissal of all claims. The District Court granted Respondent City of McAllen's Motion to Dismiss as to the Petitioners' claims against the City of McAllen under the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.001 and the state law claims were dismissed with prejudice. (Pet. App. at 16-48). The District Court denied Respondent's Motion to Dismiss as to the municipal liability claim against the City of McAllen under 42 U.S.C. § 1983. (Pet. App. at 16-48). Shortly after the District Court issued its ruling on the Respondent's Motion to Dismiss, the Petitioners filed their Third Amended Complaint. The Petitioners amended their complaint to remove the state law claims and only alleged a state-created danger claim against the City of McAllen and the individual officers–Hernandez, Resendez, Olivarez, and Hassan. (USCA5 139-146).

Respondents filed their Motion for Summary Judgment challenging the viability of the alleged due process violation against Dominga Saenz, which was premised on a state-created danger theory. Respondents based their argument challenging the viability of a state-created danger claim on the fact that the Fifth Circuit has not officially adopted the state-created danger theory. (USCA5 201-203). Respondents also argued that the Petitioners failed to meet their initial burden of identifying and establishing a custom, policy, or practice that the City of McAllen maintained that would hold the City liable for the violations the Petitioners alleged, and further argued in the alternative that the Peitioners

failed to provide sufficient evidence that would establish the required elements of a state-created danger claim. (USCA5 204-223). Respondents also argued that the conduct of Respondents Hernandez, Olivarez, Resendez, and Hassan, in their individual capacities, was objectively reasonable under the circumstances presented to them at the time of the incident, and should be entitled to qualified immunity as a matter of law. (USCA5 204-223).

The District Court issued its Memorandum of Decision and Order granting Respondents' Motion for Summary Judgment in its entirety and dismissing all of the Petitioners' claims against all of the Respondents with prejudice. (Pet. App. at 49-72). The District Court concluded "that summary judgment in favor of Defendants is proper as a matter of law because the Fifth Circuit has not formally recognized and adopted this theory of recovery in a civil rights action." (Pet. App. at 58). The District Court concluded further that "there is an absence of a constitutional violation, so the Defendant Officers are entitled to qualified immunity." (Pet. App. at 58). The District Court held that the Petitioners did "not [adduce] evidence that state actors created or increased the danger to Dominga Saenz or acted with the requisite deliberate indifference, nor have [Petitioners] raised any genuine issues of material fact in this regard", or as to their municipal liability claim. (Pet. App. at 58, 69-71).

IV. FIFTH CIRCUIT AFFIRMS

On October 4, 2010, the U.S. Court of Appeals for the Fifth Circuit affirmed the summary judgment granted on the individual Defendants' qualified immunity defense (on the ground that the "state-created danger" theory of

recovery has not been applied in the Fifth Circuit with such "obvious clarity" as to apprise a reasonable officer that his conduct would be unlawful), affirmed the summary judgment on the City's qualified immunity defense (on the ground that the City's review of its officers' conduct had not amounted to a ratification), and affirmed the earlier dismissal of the state law claims against the City. (Pet. App. at 1-15).

The Court also held that the Plaintiffs had not preserved other claims based on the City's alleged "shoot first ask questions later" policy and alleged failure to train its officers to handle mentally ill persons (and had failed to preserve other claims regarding the City's alleged failure to train and adopt appropriate policies). (Pet. App. at 14, n. 7).

REASONS FOR DENYING WRIT OF CERTIORARI

I. ENTITLEMENT TO QUALIFIED IMMUNITY ESTABLISHED AS A MATTER OF LAW

A. Preliminary Overview of Applicable Law

Petitioners' "circuity of reasoning" and related arguments misapprehend the role of the "state-created danger" theory in establishing (i) the violation of a due process right via conduct which is (ii) objectively unreasonable in light of clearly established law at the time of the alleged violation.

1. Role of "state-created danger" theory in establishing the violation of a substantive due process right

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must (i) allege a violation of rights secured by the Constitution or laws of the United States, and (ii) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Lauderdale v. Tex. Dept. of Criminal Justice*, 512 F.3d 157, 165 (5th Cir. 2007).

In general, direct State violations of an individual's rights to life and bodily integrity undertaken arbitrarily and under color of State law constitute violations of the substantive due process right to not be made to suffer arbitrary deprivations of one's life or bodily integrity at the hands of the State. *See e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998); *Graham v. Connor*, 490 U.S. 386, 396, n.10 (1989).

However, injuries suffered at the hands of other (private) parties which the State might have *prevented* do *not* normally constitute State deprivations. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 198-203 (1989). Furthermore, State conduct which does *not* "shock the conscience" (*e.g.*, conduct that is merely negligent) does not constitute a substantive due process deprivation, *Collins v. City of Harker Heights, Tex.*, 503 U.S.115, 126 (1992), nor does State conduct which merely violates State law. *See Coyne v. City of Sommerville*, 972 F.2d 440, 444 (1st Cir. 1992).

As a result, allegations that a State actor (i) merely allowed private parties to inflict death or injury, (ii) negligently inflicted death or injury, or (iii) violated State law do not, under normal circumstances, constitute allegations of substantive due process violations and are not actionable pursuant to 42 U.S.C. § 1983.

In connection with the first above-stated example (that merely allowing private parties to inflict death or injury does not constitute a due process violation), this Court in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) held that a constitutional duty to protect an individual from private violence can arise where the State has created a special relationship between itself and the victim by, *e.g.*, affirmatively acting to restrain the victim's freedom. *DeShaney*, 489 U.S. at 200.

The majority of Circuits, excluding the Fifth, have also read into *DeShaney* a second, so-called "state created danger" theory under which a duty to protect a victim from private violence can also arise when the State has affirmatively acted to create the danger (or to render the claimant more vulnerable thereto).

Importantly, however, this "state created danger" is held to apply only to injuries inflicted by private parties—not those inflicted by State actors such as a police officer whose discharged bullet has injured a Plaintiff. *See e.g.*, *Moore v. Guthrie*, 438 F.3d 1036, 1042 (10th Cir. 2006) (holding that neither the "special relationship" nor the "state-created danger" exceptions give rise to substantive due process claims resulting from injuries inflicted by other State actors such as may be caused by an accidental or negligent shooting by a police officer).

In sum, a complaint that a State (i) violated State law, (ii) merely acted negligently or carelessly, or (iii) merely failed to protect the complainant from injury at the hands of private parties, does not normally constitute a substantive due process claim, whereas a "state-created danger" allegation that a state actor failed to protect the complainant from private-party violence which had been affirmatively created by the State, constitutes what most circuits, excluding the Fifth, consider to be a substantive due process claim actionable pursuant to 42 U.S.C. § 1983.

2. Requirements for Overcoming Qualified Immunity

In order to overcome the defense of qualified immunity a plaintiff must, of course, show that an individual defendant's conduct (i) violates a constitutional right and was (ii) objectively unreasonable in light of clearly established law at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 818-22 (2009).

In determining whether conduct was objectively unreasonable in light of clearly established law at that time, the Court's inquiry focuses on whether the official was on notice that the conduct violated clearly established law and that the law itself provided fair warning that his conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). Although this Court recognized in *Pearson v. Callahan* that circumstances may arise in which it would be preferable to initially address the first of these two inquiries (whether a constitutional right was violated), it held that courts may address either inquiry first. *Id.*, at 818-22.

In the instant case, the Fifth Circuit properly and correctly made its qualified immunity determination by sole reference to the second (objectively unreasonable) requirement, but the facts and applicable law also demonstrate that no due process violation occurred.

B. No Due Process Violation Occurred

Although the Fifth Circuit properly and correctly made its qualified immunity determination by sole reference to the "objectively unreasonable" requirement, the Petitioners urge as inevitable a consideration of whether the Respondents' conduct amounted to a substantive due process violation on the ground that the Fifth Circuit's determination was based on a circuity of reasoning by which it conflated or confused existence and knowledge of a state-created danger theory of recovery with existence and knowledge of an actual substantive due process violation. (Pet. at 10-18).

The Petition in effect contends in this regard that (i) the elements of the state-created danger theory subsume, but are not synonymous or coextensive with, specific substantive due process violations; that (ii) where a 42 USC § 1983 claim is based on the state created danger theory, establishing the "objectively unreasonable" requirement does not require demonstrating the actor's objective awareness that his conduct would be actionable under the state-created danger theory as opposed to demonstrating his mere awareness that same would violate a substantive due process right; and that (iii) in the instant case, the Respondents' conduct violated numerous substantive due process rights of Dominga Saenz of which they should have been fully aware. (Pet. at 10-18).

The Petition then goes on to discuss various kinds of conduct which it asserts prove that a due process violation occurred in the instant case (Pet. at 19-24)).

Specifically, it purports to find discreet due process violations in the following propositions (many of which are not, however, supported by any evidence of record), viz:

- the proposition that Dominga Saenz was actually shot by the police officers (based on the Petitioners' allegation that more bullets struck her than could have been fired by her son);

- the proposition that Dominga Saenz was shot by police officers after the officers had affirmatively ordered her to participate in an obviously dangerous police action and had failed to take any precautionary measures to protect her (Pet. at 19-20);

- the fact that the officers' conduct allegedly demonstrated "a willful disregard for obvious risks of placing an untrained citizen into a physical police action" (Pet. at 21);

- the proposition that Dominga had been "summoned to physically engage in police action" and was "under the direct and immediate control of...state actor[s]" (Pet. at 23-24); and

- the proposition that the officers' decisions were "not made during an emergency situation," but were instead made in circumstances in which the officers "had the luxury to truly deliberate about the decisions they were making" (Pet. at 24).

When closely examined, however, each such "example" is found wanting as a due process "violation."

For example, as noted above, the *accidental* shooting of a private citizen by a police officer does not constitute a due process violation, and neither does a gunshot wound which a *police officer* inflicts on a person who has been placed in danger by State actors. *Moore*, 439 F.3d at 1039-42 (holding that neither the "special relationship" nor the "state-created danger" exceptions give rise to substantive due process claims resulting from injuries inflicted by state actors).

As for the Petitioners' examples of violations allegedly stemming from the violence inflicted by private third parties, the correctness of the Fifth Circuit's analysis (and non-circuity of its reasoning) is seen in the fact that *absent* applicability of the "special relationship" or "state-created danger" theories, no due process violation results from a State actor's failure to protect persons from third-party violence, and that whether a State actor is on notice that his conduct will violate clearly-established law therefore depends entirely on whether an exception is clearly established which operates to proscribe conduct such as that in which he is engaged.

In determining whether any kind of due process violation could have resulted from the circumstances of this case, the Fifth Circuit was therefore required to start (as it did) with this Court's *DeShaney* holding that, as a general matter, a person has *no* due process right to governmental protection from violence inflicted by a private actor. *DeShaney*, 489 U.S. at 197.

The only exception expressly recognized by this Court is the "special relationship" exception by which the constitutional duty to protect an individual from private violence can arise where the State has created a special relationship between itself and the victim by, *e.g.*, affirmatively acting to restrain the victim's freedom. *DeShaney*, 489 U.S. at 200.

The only other exception which *any* court has recognized is the state-created danger exception itself, which many Circuits (but not the Fifth) read into this Court's statement that "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." *DeShaney*, at 201; *see* Justin M. Rindos, *Fallen on Deaf Ears: DeShaney Revisited*, 21 QUINNIPIAC PROB. L.J.321, 333 (2008).

The central issue in a state-created danger case is whether the right to substantive due process guarantees a citizen the right to be free from acts of violence inflicted by a third party when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury. *See McLendon v. City of Columbia*, 305 F.3d 314, 335 (5th Cir. 2002) (J. Parker dissenting).

Under the state-created danger theory the very question of whether a substantive due process right exists or violation occurs thus depends upon the existence and nature of the affirmative role which the accused state actor's conduct has played in creating or exacerbating the dangerous situation leading to a citizen's injury. *Id.*

Under the established law of the Fifth Circuit (which has recognized but not adopted the state-created danger theory), establishing a due process violation under the state-created danger theory requires a plaintiff to show that "(1) the state actors created or increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference." *Luevano v. Geyer*, 355 Fed.Appx. 834, 836, 2009 WL 4798142 (5th Cir. 2009) (quoting *McKinney v. Irving Indep. Sch. Dist.*, 309, F.3d 308, 313 (5th Cir. 2002) (en banc)). In this connection, the Fifth Circuit has held that the "environment created by the state actors must be dangerous; they must know it is dangerous; and ...they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Scanlon v. Texas A&M University*, 343 F.3d 533, 538 (quoting *Pitrowski v. City of Houston*, 237 F.3d 567, 585 (5th Cir. 2001)). Liability exists only if the state actor is aware of an immediate danger facing a known victim. *Saenz v. Heldenfels Bros., Inc.*, 183 F.3d 389, 392 (5th Cir. 1999).

In essence, a petitioner must thus show "that the state actors created a dangerous environment, that they knew it was dangerous, and that they 'used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'" *McKinney*, 309 F.3d at 313-314. To establish deliberate indifference, a state actor must know of and disregard an excessive risk to the victim's health and safety...the state actor's actual knowledge is critical to the inquiry. *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002). A state actor's failure to alleviate 'a significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Farmer v. Brennan*,

511 U.S. 825, 837 (1994)). Furthermore, "[i]naction by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens under the Constitution]." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993).

Aside from the issue of objective unreasonableness and the state of the Fifth Circuit's adoption or non-adoption of the state-created danger theory, the evidence here simply does not support the Petitioners' assertions that the Respondents either (1) created or increased the danger to Dominga Saenz, or (2) acted with deliberate indifference towards Dominga Saenz.

1. The Respondents did not create or increase the danger to Dominga Saenz.

As stated in the Petitioners' pleadings, the Petitioners agreed with the McAllen Police Department (MPD) on September 3, 2005, that the MPD would go section Nelson Saenz to the Hidalgo County MHMR facility. (USCA5 139-141). The Petitioners alleged that they informed the MPD that Nelson was alone and had 1 handgun. *Id.* The Petitioners further alleged that Dominga Saenz received a phone call from the MPD on the afternoon of September 3, 2005 advising her that the MPD was already at Nelson's apartment in an effort to section Nelson to MHMR. *Id.* The Petitioners alleged MPD told Dominga Saenz that their efforts were not working and that the MPD told her to get over to Nelson's apartment immediately. *Id.* The Petitioners alleged that when Dominga Saenz arrived at Nelson's apartment, the MPD grabbed Dominga by her arm and forcefully pulled her out of the car and pulled her by the arm to the front of Nelson's apartment door.

Id. The Petitioners further alleged Dominga objected to going to Nelson's front door. *Id.*

As concluded by the District Court and affirmed by the Fifth Circuit, the Petitioners do not have sufficient evidence to support their factual allegations. (USCA5 1025). Petitioners Yolanda Ramirez and Ana Saenz provided sworn responses to Defendants' Interrogatories; however, their responses describing the incident in question are simply a reproduction of the factual allegations stated in their pleadings. (USCA5 473-493).

There is no evidence that indicates that Armando, Linda, or any person from the McAllen Police Department instructed Dominga Saenz to come to Nelson's apartment. Respondent Armando Hernandez and Linda Hernandez have both testified that they did not instruct Dominga Saenz to come to Nelson Saenz's apartment. (USCA5 249-250, 318-320, 350). In fact, Petitioner Yolanda Ramirez testified that while she was driving her mother Dominga Saenz and her sister Ana Saenz to the McAllen Police Department, her mom instructed her to drive to Nelson's apartment. (USCA5 600-601, 627). In fact, Dominga Saenz had never communicated with the McAllen Police Department prior to the incident. *Id.* Thus, the Petitioners' sworn testimony given in an oral deposition negates their allegations that the McAllen Police Department or Armando or Linda called Dominga Saenz and told her to come to Nelson's apartment. *Id.*

The actions of Linda and Armando Hernandez in initially going to Nelson Saenz's apartment were done as a result of a request made by Linda's aunt, Dominga Saenz. (USCA5 241-242). In the Petitioners' own *Statement*

of Facts in their Response to Defendants' Motion for Summary Judgment, the Petitioners stated that after Dominga and Ana had asked Linda Hernandez to go section Nelson, "Dominga Saenz and Ana Saenz realized that they needed to have Nelson formally sectioned at the police station." (USCA5 889). It is undisputed and there is ample testimony which shows that the only reason Linda Hernandez and her husband Armando Hernandez went to Nelson's apartment was because Dominga and Ana had asked Linda to go to Nelson's apartment to section him. (USCA5 241-242, 889).

2. The Respondents did not act with deliberate indifference towards Dominga Saenz.

As stated above, in order to establish deliberate indifference, "a state actor must know of and disregard an excessive risk to the victim's health and safety...The state actor's actual knowledge is critical to the inquiry. A state actor's failure to alleviate 'a significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002); *see also McClendon*, 305 F.3d at 326 n.8.

Based on what was known to Armando Hernandez and on-duty police officers Olivarez, Resendez, and Hassan, it is clear that prior to the actual shooting incident itself, no one had actual knowledge that Nelson Saenz would use deadly force. (USCA5 863-881). While there was knowledge that there were possibly handguns located inside Nelson's apartment, no one had any actual knowledge that Nelson had a gun in his hand or that he might possibly come outside with a gun and begin shooting. *Id.* If there was

any knowledge that Nelson had a gun in his hand or might use a gun, one can reasonably assume that Armando Hernandez, an off-duty police officer with many years of experience, would not put himself, his wife Linda, and his wife's aunt Dominga Saenz directly in front of Nelson's front door where they would be in danger of being shot by Nelson. In addition, according to the deposition testimony, Dominga Saenz voluntarily walked up to Nelson's front door with Linda and Armando to try and get Nelson to come out. (USCA5 257-258, 323-324, 615-632, 803-804, 826, 836-837). If Nelson's mother had any knowledge that her son would be using a gun or that he would use a gun to shoot at her, she clearly would not willingly put herself in that type of danger. Furthermore, it was the Petitioners themselves, Yolanda Ramirez and Ana Saenz, who voluntarily drove their mother to Nelson's apartment at their mother's own request, and it was the Petitioners themselves, Yolanda Ramirez and Ana Saenz, who never once objected to their mother walking to Nelson's front door to try and get him to come out. (USCA5 615-632). Dominga herself did not object to walking up to her son's front door. *Id.* If Petitioners Yolanda Ramirez or Ana Saenz had any knowledge or indication that their brother Nelson would use a gun, they certainly would not have taken their mother to Nelson's apartment or allowed their mother to put herself in that position. *Id.*

Given the facts known to Armando Hernandez and the police officers prior to the shooting incident, Armando Hernandez and the police officers did not have actual knowledge of Nelson's intentions of deadly conduct, nor did the police officers have any knowledge of the likelihood of Nelson's deadly conduct because up until the point

when Nelson came outside of his apartment with a gun, Nelson had not displayed any behavior that would indicate he would try to hurt anyone or that he would use a gun. (USCA5 255-256, 863-881). Further, the first time the officers un-holstered their weapons was not until Nelson began firing his weapon at his mother Dominga. *Id.* Based on the information that was relayed to the on-duty police officers at the scene by Armando Hernandez and based on Nelson's actual conduct at that time, the police officers only had actual knowledge that Nelson was mentally unstable, but given that Nelson never stated he had a gun in his hand, nor did he threaten to use a gun, nor was any gun seen in his hands when he opened his door prior to the actual shooting incident, no one at the scene, neither the police officers nor the members of the Saenz Family, had actual knowledge that Nelson had intentions of using deadly conduct or that he was likely to use deadly conduct. (USCA5 255-256, 798-799, 863-881).

Further, there was no actual knowledge on the part of Armando Hernandez or the on-duty police officers prior to the shooting incident that Nelson was threatening anyone's life at the scene or attempting to take his own life. *Id.* Ultimately, given Armando Hernandez's knowledge of the situation and his training and experience as a police officer, there is no way Armando Hernandez would have put his own life, his wife's life, and Dominga's life in danger by going to Nelson's front door if he had any belief that Nelson would use a gun and come outside and begin shooting at them. *Id.* Thus, there was no actual knowledge on the part of Respondents Armando Hernandez or Officers Olivarez, Resendez, and Hassan of Nelson's deadly intentions prior to the shooting incident. *Id.*

In addition to the lack of actual knowledge of Nelson's deadly conduct, the police officers did not have the legal authority to intervene in the situation or take Nelson into custody prior to the actual shooting incident. TEX. HEALTH & SAFETY CODE § 573.001. TEX. HEALTH & SAFETY CODE § 573.001 determines whether the police officers had the legal authority to intervene in the situation involving Nelson, or to take Nelson into custody prior to the shooting incident. Under § 573.001, a peace officer, without a warrant, may take a person into custody if the officer has reason to believe and does believe that the person is mentally ill; and because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and believes that there is not sufficient time to obtain a warrant before taking the person into custody. TEX. HEALTH & SAFETY CODE § 573.001. A substantial risk of serious harm to the person or others may be demonstrated by the person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. *Id.* The peace officer may form the belief that the person meets the criteria for apprehension from a representation of a credible person or on the basis of the conduct of the apprehended person or the circumstances under which the apprehended person is found. *Id.*

Given the facts known to the police officers prior to the incident, the police officers did not have the legal authority to intervene in the situation involving Nelson Saenz prior to the shooting incident. (USCA5 863-881). Prior to the shooting incident, Nelson Saenz did not conduct himself in a manner that would cause the police officers to believe that because of Nelson's mental illness

there was a substantial risk of serious harm to Nelson or to others. (USCA5 255-256, 863-881). Further, prior to the incident, Nelson was not committing any crime, nor was he conducting any illegal activity; thus, the police officers did not have the legal authority to intervene in the situation prior to the incident. (USCA5 255-256, 863-881). Thus, one can reasonably conclude the police officers did not create a dangerous situation, nor did they have any knowledge that the immediate situation was dangerous. *Id.*

Even if the Petitioners' factual allegations are taken as true, they would still not have a valid claim under the state-created danger theory. The police officers (and the off-duty police officer for that matter) did not use their authority to create an opportunity that would not otherwise have existed for Nelson's crime to occur. *Id.* Recall that the uniformed police officers were out of Nelson's sight and positioned themselves away from Nelson's view. Had the police officers not been called and had Linda and Armando not been involved, and Dominga went to Nelson's residence by herself without the presence of any police officers, Nelson probably would have done the same thing given that Nelson was only shooting at his mother–meaning, Dominga did not face a more dangerous situation than she otherwise would have faced independent of the police officers' presence and involvement in the situation. (USCA5 263-276).

While the officers would not have allowed Dominga to go to Nelson's apartment had they had actual knowledge Nelson was going to use deadly force, if the individual officers did anything at all, it was their inaction or their not stopping Dominga Saenz from going to Nelson's apartment door. This inaction, or passive act, on the

part of the officers does not rise to the level of deliberate indifference. (USCA5 826, 837, 859). The case law clearly states that "a state actor's failure to alleviate 'a significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002); *see also McClendon*, 305 F.3d at 326 n.8. Furthermore, "[i]naction by the state in the face of a known danger is not enough to trigger the obligation [to protect private citizens under the Constitution]." *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993). The court in *Johnson v. Dallas Indep. Sch. Dist.* noted: "[t]he key to the state-created danger cases...lies in the state actor's culpable knowledge and conduct in ***affirmatively*** placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994) (emphasis added).

None of the individual officers affirmatively placed Dominga Saenz in a position of danger. *Id*; (USCA5 255-256, 615-632, 798-799, 863-881). Based on the evidence as supported by the record, the individual police officers did not act with deliberate indifference towards Dominga Saenz and did not create the situation that caused her death. Thus, the Petitioners cannot prove the essential elements of a due process violation under the state-created danger (or any other) theory.

C. Conduct Not Objectively Unreasonable

In addition to the fact that no due process or other constitutional deprivation occurred even within the

contours of the state-created danger theory of recovery, the Respondents' conduct was, as a matter of law, not objectively unreasonable within the contours of that theory as same have repeatedly been articulated in Fifth Circuit decisions.

In this connection, it is seen that police officers are immune if they could have reasonably believed their actions to be lawful in light of clearly established law and the information the officers possessed. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 537, 116 L.Ed.2d 589, 595-96 (1991). Even if law enforcement officials err, they are entitled to qualified immunity if their decision was reasonable. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir.1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

Based on the evidence of record, as discussed *supra*, the actions of Respondents Hernandez and Officers Olivarez, Resendez, and Hassan were objectively reasonable even had the Fifth Circuit adopted the state-created danger theory, since no evidence shows that either Armando Hernandez or the three officers had actual knowledge that the situation was dangerous, that Nelson would come outside and start shooting, that they used their authority to put Dominga Saenz in face of a known danger, or that they prevented Dominga Saenz from removing herself from Nelson's front door. (USCA5 255-256, 615-632, 798-799, 863-881). Objective reasonableness within the contours of the state-created danger theory is not necessary in the instant case, however, because the Fifth Circuit has not adopted that theory. *See Saenz v. McAllen*, (slip opinion) 2010 WL 3852358 *3 and 4 (5th Cir. 2010) and authorities cited.

As this Court stated in *Will v. Hallock*, 546 U.S. 345, 353 (2006):

> "Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was. The nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established....'

Id., at 353.

Whether the only pled basis for imposing liability on State actors for failing to protect against the violence of a private third person has been "clearly established" by the Circuit in which the conduct is alleged to have occurred is highly relevant to, if not dispositive of, whether the state of the law at the time of the occurrence provided fair warning to the State actor that his conduct was unconstitutional. *See e.g., Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (holding that "[A] defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have known that the defendant's conduct violated the United States Constitution of the Federal Statute as alleged by the plaintiff" and recognizing the existence of binding Circuit precedent to be strongly indicative of the necessary clarity).

In light of the fact at the time of the occurrence the Fifth Circuit had not (and has still not) adopted the

state created danger theory, such theory was not clearly established within the Fifth Circuit such as to apprise reasonable officials in the Respondents' circumstances that their conduct was in violation of any due process right to State protection from private third-party violence, and given the fact that such conduct did not in any event fall within the contours of any such right as same had been articulated by the Fifth Circuit, such conduct was not, as a matter of law, objectively unreasonable in light of clearly established law at the time it occurred.

D. The Municipal Liability Claims Fail as a Matter of Law.

The Petitioners allege municipal liability pursuant to 42 U.S.C. § 1983 for the death of Dominga Saenz. Specifically, the Petitioners allege that the McAllen Police Department Police Chief has a "shoot first, ask questions later." For a city to be held liable under the state-created danger exception, the plaintiff must prove that the elements of the cause of action were a result of an official policy, practice, or custom of that governmental body's policymakers. 42 U.S.C. § 1983; *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403 (1997).

A governmental entity may be liable under 42 U.S.C. § 1983 if the execution of one of its customs or policies deprives a plaintiff of his constitutional rights. *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691 (1978). To state a cause of action against a defendant under 42 U.S.C. § 1983, the plaintiff must allege (1) a policymaker; (2) an official policy or custom; and (3) a violation of the plaintiff's constitutional rights whose "moving force" is the policy or custom. *Doe v. Ennis Indep. Sch. Dist.*, No. 3:05-CV-

1999-R(BH), slip op. at 2 (N.D. Tex. Jan. 31, 2007) (citing *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)).

"Official policy is defined as:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.) (per curium), *aff'd in relevant part*, 739 F.2d 993 (5th Cir. 1984) (en banc).

In order to establish a policy, custom, or practice, a plaintiff must show a "pattern of similar incidents" that is "general or widespread." *Languirand v. Hayden*, 717 F.2d 220, 227-28 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Such a pattern is evident if there are "numerous

prior incidents" showing a "systematic violation of constitutional rights." *Hererra v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); *see also Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985) (en banc). A single incident, unaccompanied by supporting history, is not a sufficient basis for inferring a custom or policy unless the actors involved were given official policy-making authority. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1339-40 (5th Cir. 1989). In order to establish a policy, practice or custom, plaintiffs must allege and prove specific facts.

In this case, there is absolutely no evidence, other than the Petitioners' conclusory allegations, to indicate that the McAllen Police Department has any such policy of "shoot first, ask questions later." (USCA5 863-881). Further, there is no evidence to indicate that the McAllen Police Department has a policy or practice of intentionally placing citizens in danger, creating dangerous situations for citizens, or disregarding known risks to citizens. *Id.* In fact, the evidence is clear that the McAllen Police Department has written policies that specifically addresses the procedures in handling the mentally ill which is in compliance with state law, and the individual officers were adequately trained and met the requirements set forth under Texas law. *Id.* Further, since the Petitioners cannot establish a valid constitutional violation, the Petitioners' municipal liability claim fails as a matter of law.

CONCLUSION & PRAYER

Petitioners failed to state a valid cause of action under the state-created danger (or any other) theory, and thus cannot establish a substantive due process violation. Furthermore, the individual officers are entitled to qualified immunity as the Petitioners' allegations do not assert a claim under the state-created danger exception and because the state-created danger theory as a basis of liability was not clearly established law at the time this incident occurred. Moreover, since Petitioners cannot establish a constitutional violation, their municipal liability claim fails as a matter of law. Therefore, there are no compelling reasons to grant the Petition for Writ of Certiorari. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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